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IN THE

Supreme Court of the United States

October Term 1942
No. 1008

BROOKLYN TRUST COMPANY, as Trustee of a trust created in and by the Will of SUSANNA E. COFFIN, deceased,

Petitioner,

—against—

CHARLES H. KELBY and CLIFFORD S. KELSEY, as Trustees of the Debtor; PRUDENCE BONDS CORPORATION (New Corporation); GEORGE E. EDDY; HILDA S. REESE; and President and Directors of the Manhattan Company,

Respondents.

BRIEF FOR RESPONDENT GEORGE E. EDDY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SAMUEL SILBIGER,
Counsel for Respondent,
George E. Eddy.

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BRIEF FOR RESPONDENT GEORGE E. EDDY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below.

The opinion of the District Court (R. 278) is not reported. The opinion of the Circuit Court of Appeals is reported in 134 F. 2d 105.

Jurisdiction.

The opinion of the Circuit Court of Appeals was rendered February 16, 1943, and the order for the mandate thereon was entered March 7, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13th, 1925 (U. S. Code Title 28, Sec. 347).

Questions Presented.

1. Where pursuant to the confirmed plan of reorganization of a corporation debtor, the Trustee under a trust agreement securing an issue of corporate bonds has been superseded by a successor trustee, and incidental thereto the superseded trustee was directed to and filed in the District Court an accounting of its proceedings and acts under the trust agreement and petitioned for a judicial settlement of its account, pending such accounting proceeding, has the District Court the power to enjoin petitioner, a former bondholder who sold its bond prior to the reorganization, from prosecuting an action against the accounting trustee and present bondholders, predicated upon alleged violations of the trust agreement by such trustee and the corporate debtor?

2. Is Section 265 of the Judicial Code (28 U. S. C. 379) applicable to the situation in this case, and a bar to the issuance of the injunction by the District Court?

Statement.

Contrary to the allegations in the complaint in the action in the State Court (R. 263-264) and Petitioner's statement of fact (p. 9) respondent asserts that the petitioner herein with respect to its asserted claim was a party to the reorganization proceeding of Prudence Bonds Corporation, Debtor (R. 14) and to the proceeding for the judicial settlement of the accounts of respondent President and Directors of the Manhattan Company (R. 19).

I.

The law of New York State was properly applied by the Court below.

The petitioner, Brooklyn Trust Company, as testamentary trustee under the Will of Susanna E. Coffin was a party to the reorganization proceeding of Prudence Bonds Corporation, inasmuch as such proceeding resolved the rights of all creditors having claims arising under the Eighteen Series of corporate bonds issued by the debtor and each secured by a "trust fund" transferred to a corporate trustee under the specific terms of a trust indenture. Petitioner was the holder of a $1,000 bond, which it sold prior to the commencement of the reorganization proceeding, and for that reason now asserts that it was not a "creditor" of the debtor and therefore that it was not a party to the reorganization proceeding. This contention is untenable.

Petitioner instituted an action in the State Court against President and Directors of the Manhattan Company based upon allegations that said Company as trustee of the 5th Series of the Debtor's bonds "allowed the Debtor to withdraw cash and mortgages not in default while other mortgages were in default, in violation of the trust agreement to the damage and injury of * * * plaintiff" (Pet. 9).

Whether the action in the State Court be termed as one for breach of contract, or for a tort arising out of the contract, the alleged breach consisted of an act committed by the corporate trustee and the debtor jointly, and any alleged claim or claims that petitioner had, it possessed not only against the corporate trustee but also against the debtor in the reorganization proceeding. Therefore, petitioner, though not a bondholder at the time in June, 1934, when the petition for reorganization of Prudence Bonds Corporation was filed, nevertheless possessed a claim against the debtor which constituted it a "creditor" within the definition

of that term under Sec. 77B(b) of the Bankruptcy Act.* The petitioner consequently was a party to the reorganization proceeding, and insofar as petitioner's application for the writ herein is based on the assertion that it was not a creditor of the debtor or a party to the reorganization proceeding such application is without merit.

As petitioner was a party to the reorganization proceeding and to the controversy arising out of the accounting by the corporate trustee and the objections thereto filed on behalf of bondholders, whereby the bondholders seek a restoration of the trust funds improperly withdrawn, or a decree surcharging the accounting trustee for the equivalent thereof, it becomes necessary to analyze the rights and remedies of the bondholders under the law of the State of New York as a basis for the determination of the question whether the district court properly applied that law to the instant case.

Where a trustee under a corporate bond trust indenture or agreement commits acts of misfeasance or malfeasance resulting in a depletion of the trust funds, prior to the maturity of the bonds secured thereby,

(1) A bondholder could postpone any action for the misconduct of the trustee and await the maturity of his bond—whereupon, if his bond were paid in full—he would have no cause to complain. If at maturity there was a default, it would then become the duty of the trustee to liquidate the security, file its account and apply for a decree for a distribution of the proceeds of the collateral ratably among those entitled to share therein. Such an account would be with a view to a termination of the trust and the distribution of

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* Sec. 77B(b). * * * "The term 'creditors' shall include for all purposes of this section and of the reorganization plan, its acceptance and confirmation, all holders of claims of whatever character against the debtor or its property * * * The term 'claims' includes debts, securities, other than stock, liens, or other interests of whatever character."

the trust funds to the beneficiaries. Such type of right and remedy of a bondholder is not applicable to the facts in this case.

(2) A bondholder, in lieu of waiting until the maturity of his bond, upon learning of the trustee's misconduct, and prior to the maturity of his bond, could commence an equitable proceeding for the removal of the trustee, the appointment of a successor trustee, and for an interlocutory decree directing the removed trustee to render its account. The right to file objections or exceptions to such account, with the object of surcharging the removed trustee for any losses sustained, resides solely in the successor trustee, not in the bondholders, and only in case the new trustee refuses or fails to act, does the derivative right vest in a bondholder to object and except to the account in his own behalf and on behalf of all bondholders. This right and remedy pertains to every case where a corporate trustee resigns, or is removed for cause, or for any other reason such as in the case at bar pursuant to a plan of reorganization of the corporation which issued the bonds. In all these cases where the original trustee is removed prior to the termination of the trust and prior to the maturity of the bonds, and its account is incidental to turning over the trust *res* to the successor trustee, the derivative right of a bondholder to object or except to the account is coextensive with the right vested in but not exercised by the successor trustee. The successor trustee could only act as the holder of the legal claim in behalf of the trust fund and for the interest of all bondholders, and under the derivative right asserted by a bondholder the right is not personal, but representative, and can only be asserted in behalf of the bondholders as a class.

This derivative and representative right was considered and the New York Law applied thereto by the Circuit Court below in *Central Hanover Bank & Trust Co.* v. *President and*

Directors of the Manhattan Company, 105 F. (2d) 130; *Manufacturers Trust Co.* v. *Kelby,* 125 F. (2d) 650 (Cert. denied 316 U. S. 697); and in the instant case wherein petitioner seeks a writ of certiorari.

The corporate trustees contended in these cases that the established law of New York State was contrary to the law as it was applied by the Circuit Court. In the case of *Central Hanover Bank & Trust Company, supra,* and *The Manufacturers Trust Co.* case *supra,* the principal New York cases relied on by the corporate trustees were *Mittelman* v. *Manhattan Co.,* 248 App. Div. 79, aff'd 272 N. Y. 632; *Weil* v. *Manhattan Co.,* 275 N. Y. 238 and *Elkind* v. *Chase National Bank,* 259 App. Div. 661, aff'd 284 N. Y. 726. The Circuit Court analyzed, interpreted and distinguished said decisions and it is interesting to note that while the *Manufacturers Trust Company* case was decided on February 3rd, 1942, the New York Court of Appeals on April 23rd, 1942, in *In re Lawyers Westchester Mortgage & Title Co., Hurdman* v. *Berckhead,* 288 N. Y. 40, itself construed the *Mittelman* and *Weil* cases precisely as they were interpreted by the Circuit Court. The *Elkind* case, *supra,* as well as the case of *Emmerick* v. *Central Hanover Bank and Trust Co.,* 34 N. Y. S. (2d) 166 (not otherwise reported), were made the basis of the application to this Court for a writ of certiorari in the *Manufacturers Trust Company* case *supra,* and the writ was denied 316 U. S. 697.

The petitioner now reasserts that the decisions of the Circuit Court of Appeals in the instant case and in *Manufacturers Trust Co.* v. *Kelby, supra,* are in conflict with New York Law (specification of Errors 4, 5, 6 and 7) and it claims that a bondholder possesses an alternative right and remedy under the law in New York State; that based on the ownership of a bond it is an equitable owner *pro tanto* of the security underlying all the bonds secured by the trust fund and it had a right to sue the trustee in an action at law, prior to the maturity of its bond, for alleged damages it sus-

tained by reason of an impairment of the security, and that such right was not transferred or lost by the assignment of its bond.

It is concededly true, that under the New York Law, a creditor, secured by a mortgage, has a cause of action against the mortgagor or a third party for an impairment of the mortgage security.

Van Pelt v. *McGraw,* 4 N. Y. 110;
Ferraro v. *Weisman,* 136 Misc. 61, 242 N. Y. S. 73;
President and Directors of the Manhattan Company v. *Mosler Safe Co.,* 246 App. Div. 785, 284 N. Y. S. 145.

However, the interest of a mortgagee in the property mortgaged is but a contingent interest, and if notwithstanding the injury to the security, the mortgagee's debt were paid in full, all his right and interest in the security would cease and terminate; and if prior to maturity of his debt or its payment, he sued and recovered damages, such recovery would *pro tanto* constitute a reduction to possession of the legal title to such contingent interest and would have to be credited on the debt.

Ferraro v. *Marrilard Builders,* 227 App. Div. 448, 238 N. Y. S. 188;
Syracuse Savings Bank v. *Onondaga Silk Co. Inc.,* 171 Misc. 993, 14 N. Y. S. 2d 356.

Such an action by a mortgagee for impairment of the security is not an action on the bond or the mortgage—but arises out of the tortious act of a mortgagor or other party in partially destroying the mortgaged *res.*

Morgan v. *Waters,* 122 App. Div. 340, 106 N. Y. S. 882;
Syracuse Sav. Bank v. *Onondaga Silk Co.,* 175 Misc. 811, 26 N. Y. S. 2d 448.

Petitioner erroneously applies the principle that a mortgagee, holding a legal title, has a cause of action for damages impairing his security to a bondholder who holds no legal title to but only an equitable interest in the security the legal title to which is in a corporate trustee and secures not only petitioner, but approximately 1800 other bondholders. Assuming, *arguendo,* that petitioner when it held its bond, acquired any such right of action for damages individually suffered by it, as a corollary to such right it would be obliged to credit any recovery on its bond. But what it assigned was the bond for $1,000.00 which it held, without any reservation of the alleged cause of action, and without any deduction on the debt by the amount of the claimed damages.

Obviously, as the petitioner's interest in the trust fund was simply a contingent one, as security for its bond, such contingent interest could subsist only as long as petitioner owned the bond or debt—and upon the assignment of the debt and the transfer of the bond, petitioner's contingent interest in the security likewise passed to its assignee.

> *Vail* v. *Foster,* 4 N. Y. 312;
> *Chapman* v. *Brooks,* 31 N. Y. 75;
> *Craig* v. *Parkis,* 40 N. Y. 181;
> *Virginia Ry & Power Co.* v. *Davis,* 284 Fed. 479.

The gravamen of petitioner's claim in the State Court action is that it was a creditor of Prudence Bonds Corporation; that it had an equitable right in a trust *res* securing its debt; that the trustee of the *res* violated its duties; and that this situation gave rise to a claim in petitioner against the trustee in its individual capacity for damages—notwithstanding petitioner sold its bond and ceased to be a creditor of the maker of the bond. The fallacy of petitioner's position is to be found in its erroneous assumption that the claim

against the trustee in its individual capacity for damages accrued to and resides in each beneficiary of a trust estate. This is not so.

Ordinarily a *cestui* or beneficiary of a trust estate has no independent cause of action either in his own right or that of the trust estate to recover money or property wrongfully diverted by the trustee. Such a cause of action resides solely in the trustee, but if the trustee, after due demand failed to act, or if such demand would be futile, then any beneficiary may maintain a representative action in behalf of himself and all beneficiaries. The action by the beneficiary is a derivative one, brought in the right of the trustee and the trust fund.

O'Beirne v. *Allegheny & Kinzna R. R. Co.*, 151 N. Y. 372;
Agne v. *Schwab*, 123 App. Div. 746, 108 N. Y. S. 487;
Western R. R. Co. v. *Nolan*, 48 N. Y. 513;
McQuaid v. *Perot*, 223 N. Y. 75;
Harvey v. *McDonnell*, 113 N. Y. 526;
Bonham v. *Coe*, 249 App. Div. 428, 292 N. Y. S. 423, aff'd 276 N. Y. 540;
Hart v. *Goadby*, 138 App. Div. 160; 123 N. Y. S. 166.

In the case of *Hart* v. *Goadby, supra*, the Court says:

"And where personal property is held by executors or trustees in trust, and they have been guilty of a devastavit in wrongfully diverting trust funds, the action to recover the same is vested in them or their successors, and can only be maintained by them or their successors, excepting in exceptional cases where they refuse on demand to bring the action, or a demand on them would be futile, in which event the action may be brought by

the beneficiaries * * * bringing the action in behalf of all parties interested in the estate."

These principles are equally applicable whether the beneficiary claims a right to the restoration of the *res*, or money damages for an impairment of the *res* as security for his debt. The right to recover the *res*, or to collect damages for the depreciation of the *res* resides primarily in the trustee. To whatever extent a wrongdoer has impaired the security, the right of action for damages can only accrue to the holder of the legal title to the security, *i.e.*, the trustee, and any rights that the beneficiary possessed are purely derivative and can only be asserted by one beneficiary as representative for all. Whether such actions for damages to the security were instituted by the trustee, or a derivative action were brought by a bondholder, the recovery, if any, would become part of the trust fund; it would not go to the individual bondholder. The right of the bondholder in a trust fund is peculiarly analogous to the right of a stockholder in the assets of a corporation. In a stockholders' derivative action against directors, any recovery inures to the corporation and the rationale of the decision of the New York Court of Appeals in *Pollitz* v. *Gould*, 202 N. Y. 11, is especially apposite.

In that case because the rights of the stockholders in the assets of a corporation are indivisible, it was there held that an action to recover assets of the corporation was properly brought as a representative or class action on behalf of all stockholders and that the right of action passed with a transfer of a shareholder's stock. So too, in the case at bar, since the rights of the bondholders in the trust *res* or fund are indivisible, any suit, action or claim for the recovery of assets comprising a part of the trust *res* or fund inures to the benefit of all the bondholders, regardless of whether they

were such at the times the acts questioned were committed, and regardless of when a bondholder acquired his bond.*

Petitioner in its brief directs the attention of this Court to no carefully considered case in New York State which questions the above cases as controlling, authoritative and correct expositions of the law of New York State as to the right of an individual bondholder to maintain an action for damages against a corporate trustee, based on a claim that the trustee violated the express terms of the trust indenture. In the footnote on page 17 of its brief it cites several cases purporting to hold that such right in a bondholder to sue for his individual damages is "well settled". An examination of the cases it cites does not warrant the statement made, and they certainly do not cast such doubt on what the New York Law is as to justify the suggestion that the District Court, in its discretion, should have declined to determine what the indisputable law of New York State is.

The case of *Ansbacher* v. *New York Trust Co.*, 280 N. Y. 79 was not an action by an individual bondholder. Plaintiff was suing in a representative capacity "individually and on behalf of all bondholders" and the sole question certified to the Court of Appeals in that case was whether certain defenses predicated on exculpatory provisions of the trust indenture were "sufficient in law on their face". The Court of Appeals answered the question in the affirmative. There was no discussion or decision on the question as to whether

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* The trust indenture provides that it was made in consideration of "the purchase and acceptance from time to time of said Prudence Bonds by the holders thereof" (Manufacturers R. 25) that the trust fund is for the equal and pro rata benefit and advantage of all bonds (M. R. 26), irrespective of the actual date of the issuance and negotiation of the bonds (M. R. 25, 26, 37, 43) and contained a restraint clause prohibiting the enforcement of any right under the agreement except for the pro rata benefit of all bondholders (M. R. 57). Cf. *Batchelder* v. *Council Grove Water Company*, 131 N. Y. 42; *Commonwealth & Susquehanna & D. R. R. Co.*, 122 Pa. St. 306.

a bondholder could maintain an individual action for damages, or as to who were proper parties plaintiff.

The case of *Benton* v. *Safe Deposit Bank of Pottsville,* 255 N. Y. 260 was not predicated on any alleged breach of any covenant or term of the trust agreement. It was an action in negligence, and the capacity of the plaintiff to maintain an action for individual damages was not considered or passed on. The sole question presented was "the liability to bondholders of a trustee * * * for failure to record the mortgage" where by the trust indenture—made in Pennsylvania—the trustee was absolved from the duty to record same. The Court applied the Law of Pennsylvania to an interpretation of the agreement, found that under the Pennsylvania Law the agreement was legal and enforceable and decided that "in the absence of gross or wilful negligence there was nothing immoral about the trustee's agreement so as to render the application of the Pennsylvania Law repugnant to the public policy of New York State.

Savings Bank of New London v. *New York Trust Company,* 27 N. Y. S. (2d) 963 was an action by plaintiff on behalf of all holders of outstanding bonds—totalling $345,000 of which plaintiff owned $200,000 and the case has no application on the issues involved herein.

Bank of New York v. *New Jersey Title Guarantee and Trust Co.,* 256 App. Div. 609; 11 N. Y. S. (2d) 181 was not an action by an individual bondholder for his individual damages. The action was by a successor trustee for damages against the predecessor trustee for breach of covenant in the trust agreement in surrendering securities to the wrong party, there being no claim that the former trustee derived any profit from the transaction. The Court held that an action for damages was maintainable by the "present owner of the assets of the Trust". The "present owner" was the successor trustee—who was the plaintiff, and the case is in full accord with the principle hereinabove claimed by respondent to be the law of New York State.

Margulies v. *Manufacturers Trust Co.*, 148 Misc. 564, 266 N. Y. S. 657 was a decision of the Appellate Term on an appeal from the City Court of the City of New York. The question involved in this case was not analyzed and considered by the Court. The facts do not appear in the opinion which was but a short memorandum and cited *Hunsberger* v. *Guarantee Trust Co.*, 164 App. Div. 740, 150 N. Y. S. 190, affirmed 218 N. Y. 742, and *Doyle* v. *Chatham Phenix Nat. Bank*, 253 N. Y. 369. The *Doyle* case did not involve any right of a *cestui que* trust against a trustee for breach of duty; that was a case where a buyer sued because of a false certification relied on by him in making his purchase of a bond, and the action was grounded on deceit. In the *Hunsberger* case *supra*, the right of an individual bondholder to maintain an independent action for damages apparently was not raised, considered or passed on by the Court.

Petitioner also stresses the case of *Emmerich* v. *Central Hanover Bank & Trust Co.*, 34 N. Y. S. 2d, 166, in which on motion to dismiss the complaint in an action by an individual bondholder for damage, the Special Term granted the motion. In granting the motion the Special Term purported to act on the authority of *Elkind* v. *Chase National Bank*, 259 App. Div. 661, aff'd no opinion 284 N. Y. 726 and *Hendry* v. *Title Guarantee & Trust Co.*, 255 App. Div. 497, aff'd in part, no opinion 280 N. Y. 740.

The granting of the motion by the Special Term is in complete accord with the New York Law. As pointed out above, the plaintiff had no individual cause of action, and whether the plaintiff owned his bond at the time of the alleged breaches of trust, or acquired his bond thereafter, is entirely immaterial. The citation by the Court of the *Hendry* and *Elkind* cases *supra* shows a complete misapprehension of the issue involved and the law applicable thereto. The Court will recall that on the petition to this Court

for a writ of certiorari in the case *Manufacturers Trust Co.* v. *Kelby,* 125 F. 2d 650, cert. denied 316 U. S. 697 the petitioner stressed the *Hendry* and *Elkind* cases as the basis of the contention that the Circuit Court failed to follow and apply the New York Law. The petitioner herein recognizes that the Circuit Court correctly distinguished said cases and that they are inapposite and very properly does not in its brief make any reference thereto. The affirmance without opinion by the Appellate Division does not constitute an adoption or acceptance of the reasoning of the lower Court.

None of the cases cited by petitioner cast any doubt on the decision of the Court of Appeals in *O'Beirne & Allegheny & Kinzua R. R. Co.,* 151 N. Y. 372, *Western R. R.* v. *Nolan,* 48 N. Y. 513 or the decision by the Appellate Division in *Agne* v. *Schwab,* 123 App. Div. 746 and *Hart* v. *Goadby,* 138 App. Div. 160, and in so far as the petition is predicated on the failure of the Circuit Court to apply New York Law—it is entirely without merit and should be denied.

II.

Section 265 of the Judicial Code (28 U. S. C. 379) is no bar to the granting of the injunction in this case.

While Section 265 of the Judicial Code appears by its terms to prohibit a Federal Court from issuing any injunction "to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy" this Court has held that the section is not a limitation on the jurisdiction of the Federal Court, but merely goes to the question of equity in the particular issue presented for determination.

The Federal Court, having jurisdiction of the subject matter and of the parties by virtue of some Federal statute, thereupon becomes vested with the power to issue an injunction restraining any proceeding in the State Court, if under the particular facts in each case the issuance of such injunction is equitable and just. The contention of petitioner that the only exception engrafted by judicial construction on the sweeping prohibition contained in Section 265 is a case involving the possession and protection of a *res* is unsound.

In the case of *Toucey* v. *N. Y. Life Ins. Co.,* 314 U. S. 118, principally relied on by petitioner, this Court recognized that the prohibition of Sec. 265 has always been deemed inapplicable to removal proceedings, and that the true rationale of the "removal cases" is that the Removal Acts qualify such prohibition *pro tanto.* Likewise the prohibition is inapplicable to suits involving Limitations of Ship Owners Liability, proceedings under the Interpleader Act of 1926, or the Frazier Lemke Act because of the jurisdiction conferred upon the Federal Courts under the statutes. The issue presented and decided in the *Toucey* case was reduced to a very narrow question "Does a Federal Court have power to stay a proceeding in a State Court *simply* because the claim in controversy has previously been adjudicated in the Federal Court? Neither the *Toucey* case, nor *Southern Ry.* v. *Painter,* 314 U. S. 155 expressly or by implication repudiated or overruled the principle of law previously enunciated by this Court that, granted the premise that the Federal Court had jurisdiction of the parties and subject matter of an equity proceeding by virtue of some Federal Statute, the equity powers of the Federal Court are as broad as those of the State Court, and if on equitable principles the State Court would have power to and would issue an injunction staying a proceeding in another State Court, if the same litigation were

pending in the Federal Court, in like circumstance the Federal Court could and would enjoin proceedings in the State Court.

In *Sovereign Camp of Woodman* v. *O'Neill,* 266 U. S. 292, a conspiracy was entered into by approximately 25 separate claimants to institute actions against the petitioner on claims ranging from $987 to $1170 each. The petitioner filed a bill in the Federal Court for an injunction to restrain such contemplated actions in the State Court, and the Federal Court having decided that it had jurisdiction based on diversity of citizenship and because the aggregate claims exceeded $3,000.00, granted the injunction. This Court, referring to Section 265 of the Judicial Code said:

> "This section does not deprive a district court of the jurisdiction otherwise conferred by the Federal Statute, but merely goes to the question of the equity of the particular bill; making it the duty of the Court, in the exercise of its jurisdiction, to determine whether the specific case presented is one in which relief by injunction is prohibited by this section or may nevertheless be granted".

In *Looney* v. *Eastern Texas R. Co.,* 247 U. S. 214, this Court said:

> "The use of the writ of injunction, by federal Courts first acquiring jurisdiction over the parties or the subject matter of a suit, for the purpose of protecting and preserving that jurisdiction until the object of the suit is accomplished and complete justice done between the parties is familiar and long established practice. * * * So important is it that unseemly conflict of authority between State and Federal Courts should

be avoided by maintaining the jurisdiction of each free from the encroachments of the other, that Sec. 265 of the Judicial Code, Rev. Stats. Sec. 720 Act of March 2, 1793 C. 22, 1 Stat. 334 has repeatedly been held not applicable to such an injunction. Julian v. Central Trust Co., 193 U. S. 93; Simon v. Southern Ry. Co., 236 U. S. 115".

That case was followed in *Supreme Tribe of Ben Hur* v. *Cauble,* 255 U. S. 356, where the Court said:

"The District Courts of the United States are courts of equity jurisdiction, with equity powers as broad as those of state courts. That a class suit of this nature might have been maintained in a State Court, and would have been binding on all of the class we can have no doubt. Hartford Life Ins. Co. v. Ibs, 237 U. S. 662, 672; Royal Arcanum v. Green, 237 U. S. 531".

The majority opinion in *Toucey* v. *New York Life Ins. Co., supra,* did not reject *Looney* v. *Eastern Texas R. Co.,* 247 U. S. 214 as sound law and an authoritative precedent, but distinguished it as "not a relitigation case;" nor did it overrule *Supreme Tribe of Ben-Hur* v. *Cauble,* 255 U. S. 356, where it was held that the federal court, having rendered a decree in a class suit brought in behalf of all members of a certain class of beneficiaries in a fraternal association, may enjoin members of the class, found to be bound by the decree, from prosecuting suits in the State Court which would relitigate questions settled by such decree. This Court warned against erroneous implications being drawn from said case as making relitigation cases an exception to the prohibition contained in Sec. 265, U. S. Code.

These cases must be construed in the light of the doctrine laid down by this Court in *Erie* v. *Tompkins,* 304 U. S. 64 that

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a Statute or by its highest Court in a decision is not a matter of federal concern. There is no federal common law".

Thus construed, it follows from these decisions, that where a federal court has issued an injunction simply because the case before it involved a relitigation of the issue previously determined by it, such injunction violates the prohibition contained in Section 265; but if the injunction were issued not "simply" because the case involved a "relitigation" but in addition thereto there was other ground for its use—in accordance with equitable principles as they would be applied under the law of the State, then Section 265 is inapplicable. That is but another way of saying, that in the re-litigation cases, under the law of the State, there was an adequate remedy at law, in a plea of *res adjudicata* rendering it unnecessary for the intervention of the equitable arm of the Court.

So, in the case at bar, the inquiry into the merits of the petition for a writ of certiorari necessitates a determination of the question, whether, if the accounting proceeding pending below were in fact being litigated in the Supreme Court of the State of New York, would the State Court under the circumstances of this case enjoin the petitioner from prosecuting an independent action against the accounting trustee and the beneficiaries of the trust?

It is respectfully submitted that under the New York Law the answer to this question must be in the affirmative. However, emphatically petitioner asserts it does not make any claim against any *res* in the possession and control of the Court, a realistic view of the fact is that

its action is founded on an alleged improper depletion of the trust *res* which constituted the collateral security for its bond. It is endeavoring to enforce a right arising out of a contingent interest in such trust *res*. The proper administration by the Trustee of such trust *res* is the subject matter of the proceeding instituted by the trustee for the judicial settlement of its account and the issues raised by the objections to such account. The accounting proceeding under New York Law is a plenary one, the petition, account and objections constituting the pleadings, *Matter of Hearns,* 214 N. Y. 426, at 432; *in re: Juillard's Will,* 169 Misc. 270; 7 N. Y. S. 2d, 290, in which petitioner claiming the infringement of any equitable rights in the trust *res* could intervene, assert, and litigate its claim. The Court having acquired plenary jurisdiction of the parties and of the subject matter could and would in the accounting action, enjoin the prosecution of a separate proceeding by an individual claimant in the exercise of its equitable power to prevent a multiplicity of suits and upon the familiar equitable principle that where full relief can be had in one suit equity will allow no other suit to be maintained.

Scheule v. *Reiman,* 86 N. Y. 270;
Gould v. *Gould,* 118 Misc. 576, 195 N. Y. S. 113;
Gould v. *Gould,* 203 App. Div. 817, 197 N. Y. S. 524;
Whitney v. *Delaney,* 73 N. Y. 571;
Cf. Colson v. *Pelgram,* 259 N. Y. 370;
Husted v. *Thomson,* 158 N. Y. 328 at 337.

In *Metropolitan Trust Co.* v. *Stallo,* 166 App. Div. 639, 152 N. Y. S. 183, the Court said:

"The authority of the Supreme Court sitting as a Court of Equity, and indeed its duty, in a proper case,

to stay proceeding in another court, is so well established that it will not be questioned. The only inquiry is as to when a proper case is presented * * * nor is it an insuperable objection to such an injunction that it restrains the prosecution of proceedings as to which the Surrogate's Court has concurrent or exclusive jurisdiction. * * * While the jurisdiction and authority of the Supreme Court to restrain the prosecution of proceedings in other tribunals are not necessarily determined by the priority of institution, the case for such restraint is much strengthened when, as in this case, the commencement of the action in the Supreme Court antedates the commencement of the action or proceeding sought to be enjoined. In Scheule v. Reiman, 86 N. Y. 270, the Court of Appeals said:

> "'Where the object of two legal proceedings is the same; convenience, as well as a proper regard for the rights of a debtor and creditor, require, if possible, that the fund in which both are interested should be subjected to diminution by one litigation only, and the parties themselves spared the unnecessary labor and expense of conducting two controversies over the same matter. It would seem, also, that if both tribunals, whose interference has been invoked have equal or concurrent jurisdiction, it should continue to be exercised by that one whose process was first issued.'"

This Court in *Princess Lida* v. *Thompson,* 305 U. S. 456, sustained an injunction issued by the State Court against an accounting action brought in the Federal Court pending a similar prior accounting in the Pennsylvania State Court. It is inconceivable that if the situation were reversed and the proceeding had been first instituted in the Federal

Court that the parties would not have been entitled to enjoin a subsequent proceeding in the State Court. To so hold would reject the doctrine of *Erie* v. *Tompkins, supra,* that the law to be applied in the case is the law of the State, and would deny to a litigant the substantive rights to protection by injunction accorded to him by the law of the State.

The decision of this Court in *Toucey* v. *N. Y. Life Insurance Co.,* 314 U. S. 139 was not intended to produce any such result.

CONCLUSION.

The petition should be denied.

Respectfully submitted,

SAMUEL SILBIGER,
Counsel for Respondent, George E. Eddy.

Dated, May 25, 1943.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 1008

IN THE MATTER

OF

PRUDENCE-BONDS CORPORATION,

Debtor.

In the Matter of the Application of CHARLES H. KELBY and CLIFFORD S. KELSEY, as Trustees of the Debtor, and PRUDENCE-BONDS CORPORATION (New Corporation), for an order herein restraining and enjoining all parties to a certain action in the Supreme Court of the State of New York, New York County, entitled "Brooklyn Trust Company, as Trustee under the will of Susanna E. Coffin, deceased, Plaintiff, against President and Directors of the Manhattan Company; George E. Eddy; Hilda S. Reese; and Prudence-Bonds Corporation (New Corporation)," from taking any further steps and proceedings therein.

BROOKLYN TRUST COMPANY, as Trustee of a trust created in and by the will of Susanna E. Coffin, deceased,

Petitioner,

against

CHARLES H. KELBY and CLIFFORD S. KELSEY, as Trustees of the Debtor; PRUDENCE-BONDS CORPORATION (New Corporation); GEORGE E. EDDY; HILDA S. REESE, and PRESIDENT AND DIRECTORS OF THE MANHATTAN COMPANY,

Respondents.

BRIEF FOR RESPONDENTS TRUSTEES OF DEBTOR, PRUDENCE-BONDS CORPORATION (NEW CORPORATION), AND HILDA S. REESE, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the Circuit Court of Appeals (R. 305) is reported in 134 F. (2d) 105.[1]

The opinion of the District Court (R. 279) is not reported.

Jurisdiction

The opinion of the Circuit Court of Appeals was rendered February 16, 1943, and the decree and order for the mandate thereon was entered March 9, 1943.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. Code, Title 28, Sec. 347).

Statement

The order affirmed by the Circuit Court of Appeals was made by the bankruptcy court in the proceeding for reorganization of Prudence-Bonds Corporation, Debtor, under Section 77B of the Bankruptcy Act. Such order temporarily restrains the parties to a certain action in the Supreme Court of the State of New York, from taking any further proceedings therein, pending proceedings in the reorganization court by Corporate Trustees of the Debtor's bond issues for the judicial settlement of accounts of their acts as such Trustees.

The "Questions Presented" in the petition are based upon certain erroneous assumptions of material facts and petitioner's "Statement of Facts" is both inaccurate and incomplete.

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[1]In its opinion, the Circuit Court of Appeals noted the fact that, "The record on this appeal consists of some 1300 printed pages, for it incorporates by reference the record on appeal in *Central Hanover Bank* v. *Manhattan*, 105 F. (2d) 130, and that in *Manufacturers Trust Co.* v. *Kelby*, 125 F. (2d) 650" (R. 306).

The "Questions Presented" erroneously assume that the Debtor's Plans of Reorganization have been consummated, and that the old Corporate Trustees of the Debtor's bond issues have turned over all of the property securing the bonds to a new Corporate Trustee, appointed with the approval of the bankruptcy court. The "Statement of Facts" erroneously states that the bankruptcy court surrendered its control over the property of the Debtor, and presents a distorted picture of the state court action.

The opinion of the Circuit Court of Appeals (R. 305), to which we respectfully refer the Court, contains a full statement of the case. In view of this fact and in order not to unduly burden the Court, we will not here set forth the statement which would otherwise be required to correct the inaccuracies and make complete the "Statement of Facts" contained in the petition. It will be seen from the opinion that the Debtor's Plans of Reorganization, although confirmed, have not been consummated or carried out; that the bankrupt estate is still in the process of administration in that the old Corporate Trustees of the Debtor's bond issues, including Brooklyn Trust Company and Bank of Manhattan, are accounting in the bankruptcy proceeding for their acts with respect to the Trust Funds securing the Debtor's bonds (R. 307-310); that the bankruptcy court took exclusive jurisdiction over such accountings for the express purpose of making effective, consummating and carrying out the confirmed Plans of Reorganization (R. 311); that the reorganization proceeding is still pending; and that the bankruptcy court has not surrendered control over the property of the Debtor (R. 311, 314-316).

The picture of the state court action which petitioner presented to the Circuit Court of Appeals was so distorted as to cause that Court to conclude, that "this picture of the nature of the actual state court suit begun by Brooklyn is importantly inaccurate" (R. 321). The picture of the state court action which petitioner presents to this Court is likewise "importantly inaccurate". The real nature of that

action is clearly revealed in the opinion of the Circuit Court of Appeals (R. 316-322, 326-329), and shows, as the Courts below found, that the state court action clearly constitutes an unlawful interference with the jurisdiction of the bankruptcy court and the *res* in its custody (R. 284-285, 322).

I

There is no conflict between the decision of the Circuit Court of Appeals and the decisions relied upon by the petitioner.

Petitioner contends that the decision of the Circuit Court of Appeals is in conflict with many highly important decisions of this Court and several decisions of the Circuit Courts of Appeals. This contention is wholly unwarranted. It is akin to petitioner's reckless assertion that the statements in the opinion of the Circuit Court of Appeals "arbitrarily assume the applicable substantive law to be the opposite of what it actually is" (Petitioner's Brief, p. 26). The fact is, as we shall show, that this Court has already considered and declined to review most of the alleged errors specified by the petitioner.

Petitioner's claimed conflict of decisions is based upon two assumptions: (1) that there is no *res* involved in the proceedings in the bankruptcy court for the judicial settlement of the accounts of the Corporate Trustees of the Debtor's bond issues; and (2) that in deciding issues involved in the accounting proceedings, the Circuit Court of Appeals has ignored and failed to follow the law of New York.

Assuming the absence of a *res,* petitioner contends that the "hands off" doctrine of *Toucey* v. *N. Y. Life Ins. Co.,* 314 U. S. 118, and similar cases, applies. If its contention on this score be rejected, it insists that, since a question of New York law is involved, this Court should encourage and permit the state court action upon principles set forth in *Foust* v. *Munson Lines,* 299 U. S. 77; *Railroad Comm'n* v. *Pullman Co.,* 312 U. S. 496; and *Chicago* v. *Fieldcrest Dairies,* 316 U. S. 168.

The assumption that there is no *res* involved in the bankruptcy proceeding has been determined to be erroneous in two earlier decisions of the Circuit Court of Appeals in this same reorganization proceeding. These decisions are: *Central Hanover Bank & Trust Company, et al.* v. *President and Directors of the Manhattan Company, et al.*, 105 F. 2d 130, and *Manufacturers Trust Company* v. *Kelby*, 125 F. 2d 650, cert. denied, 316 U. S. 697.[2] These decisions

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[2] In the decision now sought to be reviewed the Circuit Court of Appeals said (R. 331):

> "* * * while, ordinarily, such a fact (the denial of certiorari) is not to be accorded too much weight, it may be said to have unusual force here, for the petition for certiorari urged the Supreme Court to grant the writ on the ground that the matter of jurisdiction should be promptly passed upon by the Supreme Court so that, if jurisdiction were lacking, there would be avoided lengthy, complicated and expensive accountings, and on the further ground that numerous practical future problems would be settled, including 'the effect of efforts to stay proceedings in the state courts.'
>
> In that petition it was said that, if the decisions of this court were not reversed, there would be 'no protection' to the old corporate trustees 'against claims which may be made by those who held bonds at the time of the alleged breaches of trust, who are not before the court and who will not be bound by the judgment.'"

The day after the denial of certiorari in the *Manufacturers Trust Company* case, Brooklyn Trust Company voluntarily withdrew and discontinued its appeal from an order of the bankruptcy court of the same nature as the order involved in the *Manufacturers Trust Company* case (R. 28, 30-31, 316). A few days later, ostensibly acting as Trustee of the Coffin Estate, which once held a Fifth Series Prudence bond, Brooklyn Trust Company instituted the state court action (R. 33), alleging in the complaint that the decisions of the Circuit Court of Appeals "do not conform to or follow the law of the State of New York" (R. 55). Such action as the Court below said, was instituted "obviously by prearrangement with" Bank of Manhattan, the principal defendant (R. 317, see also footnote "29", R. 328). In the District Court, counsel for Brooklyn Trust Company affirmatively stated that in the state court action the two Banks were "fighting each other so that anything that would be opposed to the Circuit Court of Appeals construction would be satisfactory to both parties" (R. 269).

also show that the Circuit Court of Appeals followed the New York law. In the *Manufacturers Trust Company* case the Court made a careful analysis of the New York cases relied upon by the Corporate Trustees (R. 312), and its opinion shows that its determination was in accordance with New York law. Moreover, many additional New York cases showing that its decision followed well settled New York law, were cited in the respondents' brief filed in this Court in opposition to the petition for certiorari in such case. The specifications of error in the petition for certiorari, which was denied, were that the bankruptcy court had no jurisdiction of the subject matter of the accounting proceedings and that the Circuit Court of Appeals had failed to follow the law of New York (R. 29-30).

Petitioner now again seeks to review the two earlier decisions of the Circuit Court of Appeals.[3] This is clear from its contention as to the absence of a *res*, its contention that the Circuit Court of Appeals ignored and failed to follow the law of New York, and its specifications of error Nos. 4 to 8 inclusive, which are based upon such contentions (Petition, pp. 12-13).

The decision of the Circuit Court of Appeals now sought to be reviewed and the two earlier decisions of that Court amply demonstrate that there is a *res* involved in the accounting proceedings in the bankruptcy court. They also show that there is no warrant for petitioner's contention that the Circuit Court of Appeals has ignored and arbi-

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[3] Brooklyn Trust Company, along with all of the other Corporate Trustees, were parties to the *Central Hanover* case (R. 310-311). In the *Manufacturers Trust Company* case, Brooklyn Trust Company, Bank of Manhattan, and four of the other Corporate Trustees, filed a brief *amicus curiae* in support of the appeal of Manufacturers Trust Company (R. 312). Moreover, Brooklyn Trust Company and Bank of Manhattan each paid a proportionate part of the fee of special counsel (R. 29) who filed the certiorari petition for Manufacturers Trust Company (R. 313). Such petition, as the Circuit Court of Appeals pointed out, "asked reversal not only of our decision in the *Manufacturers Trust* case but also of our previous decision, as to jurisdiction, in the *Central Hanover* case (R. 313-314).

trarily failed to follow the law of New York. They destroy the foundation upon which petitioner has created its claimed conflict of decisions.

All of the arguments advanced in the petition are fully answered in the opinion of the Circuit Court of Appeals. There is no conflict of decisions. Most of the decisions relied upon by petitioner are discussed and distinguished in the opinion of the Circuit Court of Appeals. And it will be seen from the opinion, that the other cases relied upon by the petitioner are not applicable to the case at bar. The restraining order of the bankruptcy court comes within two of the recognized exceptions to the doctrine of the *Toucey* case *supra,* namely, bankruptcy proceedings and the *res* cases. The bankruptcy court in granting the restraining order was well within its powers as a court of equity or under the broad provisions of Section 2a(15) (11 U. S. C. A., Sec. 11a(15)) of the Bankruptcy Act, or of Section 262 (28 U. S. C. A., Sec. 377) of the Judicial Code (*Farmers Loan & Trust Co.* v. *Lake St. Elevated R. Co.,* 177 U. S. 51; *Kline* v. *Burke Construction Co.,* 260 U. S. 226; *Ex parte Baldwin,* 291 U. S. 610; *Local Loan Co.* v. *Hunt,* 292 U. S. 234; *Continental Bank* v. *Rock Island Ry.,* 294 U. S. 648; *United States* v. *Bank of New York Co.,* 296 U. S. 463; *Steelman* v. *All-Continent Co.,* 301 U. S. 278; *Princess Lida* v. *Thompson,* 305 U. S. 456; *In re Skorez,* 67 F. 2d 187; *Dealty* v. *Posse School,* 100 F. 2d 470; *In re Hermitage Bldg. Corp.,* 100 F. 2d 597; *Collier on Bankruptcy,* 14th Ed., Vol. 1, pp. 253-254; *Cf. Looney* v. *Eastern Texas R. Co.,* 247 U. S. 214).

The *Steelman* case *supra,* is closely analogous, and the decision of this Court in such case fully supports the jurisdiction of the bankruptcy court to make the restraining order in the instant case. Indeed, as the Circuit Court of Appeals pointed out, "Here the facts are stronger than in the *Steelman* case" (R. 329). The state court action was instituted by Brooklyn Trust Company by prearrangement with Bank of Manhattan, the principal defendant, for the avowed purpose of defeating the liability sought to be

imposed upon the two Banks in the bankruptcy proceeding (R. 40, 273, 281, 283, 327). The issues in the action are deliberately narrowed and the pleadings are so contrived as to "shut out the light" (301 U. S. 278, 285). As the Circuit Court of Appeals stated (R. 330):

> "In the suit brought by Brooklyn, the issues are misleadingly narrowed and artificially presented; the true issues we conclude, cannot be adequately determined in such a suit begun in the circumstances and for the purposes above narrated."

Such determination not only brings the instant case squarely within the rule of the *Steelman* case; it also leaves no room for the application of the principles enunciated in *Gilchrist* v. *Interborough Rapid Transit Co.*, 279 U. S. 159; *Chicago* v. *Fieldcrest Dairies; Railroad Comm'n* v. *Pullman;* and *Foust* v. *Munson Lines, supra.*

In the first place, as the Circuit Court of Appeals said with regard to such cases (R. 325):

> "* * * But none of the cases in which the Supreme Court has said that federal courts should, for that purpose, encourage (or allow to go unmolested) state court litigation has involved a federal suit in which the federal court first obtained jurisdiction of a *res* and where a subsequent state court suit would involve an interference with the jurisdiction of the federal court."

Secondly, as the Circuit Court of Appeals also said (R. 326):

> "* * * in the suit brought by Brooklyn, the issues involved in the bankruptcy restoration action are presented to the state court in a manner and in circumstances which make it unlikely that state court rulings could be helpfully obtained" (R. 326).

Lastly, the necessity for any state court suit to obtain a decision on a novel and unsettled question of state law does not exist. The state law, as we have shown, is well settled,

and the bankruptcy court and the Circuit Court of Appeals have decided the pertinent questions in accordance with the state law.[4] Manifestly, the mere fact that state law may be involved in a case in the federal court, and more particularly the bankruptcy side of the court, does not require the federal court to stay its hand and send the matter to the state court for adjudication (*Alexander* v. *Hillman*, 296 U. S. 222). *A fortiori*, the bankruptcy court should not stay its hand to permit or encourage a state court suit like the one here involved, where the issues are "misleadingly narrowed and artificially presented", and where there is no real controversy between the dominant plaintiff and defendant who appear as adverse parties to the suit, who will control the litigation, and whose sole object is to defeat the liability sought to be imposed on them

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[4] The decision of the New York Special Term in *Emmerich* v. *Central Hanover Bank & Trust Co.*, 34 N. Y. S. (2d) 166 (not officially reported), affd. no opinion, 265 App. Div. 808, affords no basis for granting certiorari. The opinion in the case was printed in full in an appendix to the brief in support of the petition for certiorari in the *Manufacturers Trust Company* case. The later affirmance without opinion merely "adopts the result of the Special Term, but not the reasoning of the justice by which he arrived at the result" (*Viertels* v. *New York, Ontario & Western R. Co.*, 182 App. Div. [N. Y.] 92, 94). The *Emmerich* case was also considered by the Circuit Court of Appeals in the instant case. It was an action at law for damages and is not a case in point. It was clearly distinguished from the *Manufacturers Trust Company* case by counsel for the defendant Central Hanover Bank in his brief in the Appellate Division. Such counsel there said:

> "* * * There is not the slightest attempt on the part of counsel (for plaintiff) to show any similarity between the situation involved in the *Manufacturers Trust Co.* case and that presented in the case at bar. * * * We submit that the *Manufacturers Trust Co.* case upon analysis, is readily distinguishable from the case at bar and plainly not to be accorded the effect attributed to it by counsel for plaintiff."

in the bankruptcy proceeding.[5] Suits of that character are fictitious; they constitute abuses which this and other Courts have reprehended and judicially denominated as frauds (*Lord* v. *Veazie*, 8 How. [U. S.] 250; *Van Horn* v. *Kittitas County*, 112 Fed. 1; *Bell & Howell Co.* v. *Bliss*, 262 Fed. 131; *Judson* v. *Flushing Jockey Club*, 14 Misc. [N. Y.] 350; *Matter of V.*....., 10 App. Div.

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[5] The present insistence that the liabilities of the Corporate Trustees should be adjudicated in the state courts contrasts strangely with the views urged by the Corporate Trustees before it appeared that objections would be filed to their accounts in the bankruptcy court. Formerly they opposed the right of bondholders to maintain suits against them for accountings in the state court and such suits were stayed (*In re Prudence-Bonds Corporation*, 75 F. 2d 262). It is especially significant that at such time (1935), Brooklyn Trust Company, Bank of Manhattan and most of the other Corporate Trustees argued in the Circuit Court of Appeals in justification of such stays (See pp. 430-431 of record on appeal in *Manufacturers Trust Company* v. *Kelby, supra*):

> "If a plan of reorganization for the Debtor herein is approved, or if the Debtor is liquidated in this proceeding, presumably the Trust Companies will be required to account in the bankruptcy court for their acts as trustees under the respective trust indentures. Obviously, to permit promiscuous accounting suits to be brought and prosecuted by individual bondholders in the State courts would only result in duplication of expenses, to the detriment of the majority of the bondholders * * *."

Again, counsel for Manufacturers Trust Company advised its client at that time, "the proper forum for an accounting was in the reorganization proceedings" (R. 431 of said former record). Another Corporate Trustee then contended that the accounting asked in the state court is similar to the accounting that "the Corporate Trustee, will make at the proper time to this Court" (R. 429 of said former record).

The federal courts having held against them on their later accountings to the bankruptcy court, the shift in position emphasizes what Brooklyn Trust Company admitted and what the Courts below found, to wit, that the real purpose of the present fictitious state court suit is to defeat the liability sought to be imposed on it in the bankruptcy proceeding (R. 327; see also, footnote "3", R. 308).

[N. Y.] 491). Only a few days ago, in *United States et al.* v. *Johnson*, decided May 24, 1943, U. S. , this Court reiterated the principles of *Lord* v. *Veazie*, and held that a suit which is not in any real sense adversary lacks a safeguard essential to the integrity of the judicial process and is collusive. As this Court said in the *Steelman* case *supra* (301 U. S. 289-290):

> "* * * If suits can be enjoined when they have a tendency to embarrass administration, *a fortiori* this may be done when there is a basis for the fear that they will be used as instruments or devices to render fraud triumphant."

I I

The restraining order in no way violates any of petitioner's constitutional rights.

The fictitious and collusive nature of the state court suit is clearly indicated by the opinion of the Circuit Court of Appeals. Petitioner has admitted and the Court below found that petitioner Brooklyn Trust Company, as trustee of the estate of Susanna E. Coffin, does not seek to recover any money or property in the state court action and that the real purpose of the action is to defeat the liability sought to be imposed on Brooklyn Trust Company in the bankruptcy proceeding (R. 327, 40, 273). In the light of such admission and finding, the conclusion is inescapable that the Coffin estate does not want or seek its day in the state court, that such estate has not been injured by the restraining order, and that none of its constitutional rights have been violated. It is a fundamental principle that one seeking to raise a constitutional question must show that he is injured by the allegedly unconstitutional statute or order (*Premier-Pabst Sales Co.* v. *Grosscup*, 298 U. S. 226; *Heald* v. *District of Columbia*, 259 U. S. 114; *In re George F. Nord Bldg. Corp.*, 129 F. 2d 173). The constitutionality of the bankruptcy court's

power to issue restraining orders to protect its jurisdiction, the *res* in its custody, and to make effectual its decrees is well established. Moreover, the restraining order here involved is not permanent, the parties to the state court action being only temporarily restrained pending the accounting proceedings in the bankruptcy court.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

CHARLES H. KELBY,
Counsel for Charles H. Kelby and Clifford S. Kelsey, Trustees of Debtor,

CHARLES M. MCCARTY,
Counsel for Prudence-Bonds Corporation (New Corporation),

JOSEPH NEMEROV,
Counsel for Hilda S. Reese,

Respondents.

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